IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1632 OF 1998

1. Shri.M.Ismail, residing at B-1, Ferreira Annex, Sitladevi Temple Road, Mahim, Mumbai-400016

2. Cadbury India Limited, a company incorported under the Companies Act, 1956 and having its Registered office at Cadbury House, 19, Bhulabhai Desai Road, Mumbai-400026 ..Petitioners

Versus

1. The State of Maharashtra at the instance of Vikas Shankar Shejwal, Food Inspector, Thane Municipal Corporation, Mahapalika Bhavan, Dr.Almeida Road, Panchpakadi, Thane. ..Respondent

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Mr.Kirti Parekh with Ms.Rashmi Shrivastav i/b Ms.Bharat Shah and Co. for Petitioners

Mr.R.S.Apte with Mr.V.Limaye Advocate for Respondent no.1.

Mr.A.S.Shitole, A.P.P. for the State.

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CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : OCTOBER 7,2004

ORAL JUDGMENT:

1. The petitioners i.e. original accused nos. 10

and 11 in Criminal complaint No. 147 of 1998 pending before the learned Judicial Magistrate, F.C., Municipal Court, Thane, have preferred this petition for quashing the proceedings relating to the said case. The said is under Sections 7(1), 2(1-A) (A), 2(1-A)(F) punishable Sections 16 and 17 of the Prevention of Food Adulteration Act, 1954.

2. There are eleven accused in the said case. Accused no.1 Bhanaram Mugaram Choudhari is the vendor i.e. M/s. Ambika Sweet, situated at Hema Apartment, Lokmanya Nagar Pada No.4, Thane Municipal Corporation. He purchased one Cadbury Dairy Milk Super Value Pack from original accused no.5 M/s. Ganesh Brothers (Distributor). Original accused nos. 2 to 4 are the partners of accused no.5. Accused no.5 M/s. Ganesh Brothers had purchased for sale the cadbury dairy super value pack from accused no.8 i.e. Smt.Sudha R.Kale of M/s.Kale Transport Services i.e. accused no.8 who are C & F agent and distributor of the petitioner no.2 i.e. M/s. Cadbury India Limited. Accused nos. 6,7 and 8 are the other directors of original accused no.9. Petitioner no.1 original accused no.10 Shri.M.Ismaile is the nominee of M/s. Cadbury India Ltd. who is original accused no.11.

3. It is the case of the complainant Shri.Vikas Shejwal, Food Inspector, Thane Municipal Corporation that on 9th August, 1995 in the morning, he purchased one Cadubry Dairy Milk of Super Value Pack for himself from Ambika Sweets. On opening the said packet, he found blackish fungus formed in it. He informed this fact to Mugaram Choudhari and requested him to act as a panch. Thereafter, necessary formalities were followed. They went to the shop of accused no.1 and narrated the facts to him. The samples taken came to be wrapped, labled and sealed as required. As the complainant suspected some adulteration in the said purchased cadbury dairy milk super value pack, he expressed his desire in writing to accused no.1 of sending the said sample to Public Analyst for government analysis. The remaining two samples were sent to Local Health Authority. The report of Public Analyst was received on 19th October, 1995 which stated that ‘fungus had formed’ in the said chocolate and it was not fit for human consumption. Thereafter, on 6th March, 1998 the complaint came to be filed before the learned Judicial Magistrate, F.C.Thane.

4. On behalf of the petitioners, it has been urged that Section 13(2) of the Prevention of Food

Adulteration Act confers a valuable right on the vendor to have the samples, analysed by the Director of Central Food Laboratory. However, in the present case, the right to get second sample analysed by Central Food Laboratories under Section 13(2) of the said Act, has been effectively denied to the petitioners due to the delay in filing the complaint. It is contended that in such case, the petitioners cannot be prosecuted and penalised for the alleged offence.

5. I have heard Mr.R.S.Apte with Mr.M.V.Limaye, the learned advocates appearing for the Thane Municipal Corporation. No reply has been filed on behalf of Thane Municipal Corporation.

6. In the present case, the sample was taken on 9.8.95, the report of the Public Analyst is dated 19th October, 1995, however, the complaint has been filed after about two and half years i.e. on 6th March, 1998. When a valuable right is conferred by Section 13(2) of the Act on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that that right will not be denied to him. The right is a valuable one, because the certificate of the

Director Central Food Laboratory supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence. In a case where there is denial of this right on account of the deliberate conduct of the prosecution, I am of the opinion that the vendor, in his trial, is very seriously prejudiced that it would not be proper to convict the person on the basis of the report of the Public Analyst. In such a case, I think that the accused is entitled to claim that the prosecution is vitiated by this circumstance of denial of this valuable right guaranteed to him by the Act, which denial has occurred as a result of the conduct of the prosecution.

7. The reason why the prosecution cannot be sustained is that the accused is prejudiced in his defence and is denied a valuable right of defending himself solely due to the deliberate acts of the prosecution. When a specific right is created in favour of the accused then such offence under the

Prevention of Food Adulteration Act should be detected and the person prosecuted as expeditiously as possible. At least, precaution should be taken so that the right conferred on the accused is not rendered nugatory or of no assistance whatsoever to the accused. The Legislature has clearly intended that the prosecution in criminal matters not only must be filed diligently but must be disposed of as early as possible, more so when the prosecutions are under the Prevention of Food Adulteration Act and much more so when the article considered is a cooked food or a food made of milk as in the present case. In these circumstances merely because the Advocate in the lower Court did not making an application under Section 13(2) of the said Act as in the present case, the accused cannot be deprived of his valuable right under Section 13(2) of the Act.

8. The prosecution has shown a completely detached and totally lax approach. A food article like ‘chocolate’ cannot be preserved for a long period of time of two and half years without any preservative being added. No preservative has been added in the present case. In such case, the article of food will not remain in a fit condition to be sent for analysis after such a long period.

In the present case two and half years had passed since the taking of sample and filing the complaint, the shelf life of the chocolate is only one year, after two and half years, it makes no sense to make an application under Section 13(2) for sending it to Central Forensic Laboratory because by then even if a product was not earlier deteriorated it would deteriorate. Moreover, no preservative had been added, in such case, the product is bound to get spoiled and develop fungus etc. Moreover, there is nothing to show that the accused was informed of the result of the Public Analyst, for him to exercise his right under Section 13(2). Hence, the gross delay in filing the complaint, in the facts and circumstances of the present case, is sufficient to cause prejudice to the accused. The benefit of this delay should not be given to the prosecution, but must go to the accused. I am fortified in my opinion because the legislature now having seen the wisdom of amending Section 13, has made it compulsory that as soon as the report of the Public Analyst is received, it must be furnished to the accused within ten days and within five days thereafter, the accused should make an application that the sample kept by him or by the authorities may be sent to the Central Laboratory. For such delay the benefit of doubt

should go to the accused. If the provisions of the Act or the Rules are not complied with strictly and which provisions of the Act and the Rules are held mandatory by this Court, the prosecution is not entitled to get a conviction of the accused.

9. Today, almost ten years have passed since the incident. Nothing has been shown that the delay in the prosecution during this period of ten years is in any way attributable to any of the petitioners.

10. The learned advocate for the Thane Municipal Corporation, has submitted that in the present case no application had been made under Section 13(2) of the Prevention of Food Adulteration Act and hence, in such case, the petitioners-accused cannot claim any prejudice and in support of this contention, he has placed reliance on the decision in the case of **Ajitprasad Ramkishan Singh Vs. The State of Maharashtra reported in AIR 1972 S.C. 1631 and in the case of Gela Hira Rabari Vs. S.V.Pandya and another reported in AIR 1970 Gujarat 235.** In the case of Ajitprasad Ramkishan Singh (supra), it was observed that no prejudice has been shown. Moreover, it has not been established that the sample had deteriorated by the time the summons was issued and the accused did not exercise his right

under Section 13(2) of the Act of sending the sample to the Director of Central Laboratory. In the present case, it is seen that the sample is that of 'chocolate' which is a milk product. No preservative had been used by the complainant. The shelf life of the chocolate is about 12 months. In the present case, the complaint was filed after about two and half years, obviously, by then, the sample would have deteriorated further and at that time, after receiving the summons, if the accused has made an application for sending the sample to Central Laboratory, obviously the report would be that it had deteriorated and it was unfit for human consumption in which case, the entire purpose of making such application under Section 13(2) would be defeated. It is also pertinent to note that the respondents were unable to point out that the accused were informed of the Public Analysit's report within reasonable time.

11. In the decision of the **Gela Hira Rabri (supra),** it was held that the question as t**o** whether the delay in institution of the prosecution *per se* caused prejudice to the accused and vitiates the trial i.e. whether the delay in the institution of the complaint is reasonable and explainable and has any adverse effect on the right

of the accused under Section 13(2) of the Act, is essentially a question of fact to be decided on the merits of each case. No blanket principle has been laid down in this case. But it is stated that each case has to be examined and decided on its own merits. Few observations made in the above case i.e. Gela Hira Rabri, are as under:

> . "Now the question whether the delay in the institution of the complaint is reasonable and explainable and has any adverse effect on the right of the accused under Section 13(2) of the Act is essentially a question of fact to be decided on the merits of each case.....

12. The learned advocate for the petitioner had invited my attention to the decision of the Supreme Court in Municipal Corporation of Delhi V. Ghisa Ram, AIR 1967 SC 970, wherein it has been, inter alia, held that if because of any inordinate delay in launching the prosecution, a sample becomes decomposed and it is impossible to have it analysed by the Director of the Central Food Laboratory, the accused is deprived of a valuable right conferred by Section 13(2) in such case, the conviction of the accused cannot be sustained.

. The Supreme Court further observed in the case of Ghela Hari Rabri that:

. "It appears to us that when a valuable right is conferred by Section 13(2) of the Act on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that that right will not be denied to him. The right is a valuable one, because the certificate of the Director supersedes the report of the public analyst and it is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that for his satisfaction and proper defence, he should be able to have the the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence. In a case, where there is denial of this right on account of the deliberate conduct of the prosecution, we think that the vendor, in his trial, is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein...

. We are not to be understood as laying down that in every case where the right of the vendor to have his sampled tested by the Director of the Central Food Laboratory is frustrated, the vendor cannot be convicted on the basis of the report of the public analyst. We consider that the principle must, however, be applied to cases where the conduct of the prosecution has resulted in the denial to the vendor of any opportunity to exercise this right. Different considerations may arise if the right gets frustrated for reasons for which the prosecution is not responsible.....

. The reasons why the conviction cannot be

> sustained is that the accused is prejudiced in his defence and is denied a valuable right of defending himself solely due to the deliberate acts of the prosecution."

13. The prosecution has filed its complaint about two and half years after the sample was taken. The sample was taken on 9th August, 1995, the report of the Public Analyst was received on 19th October, 1995 and complaint came to be filed on 6th March, 1998. There is nothing to show that accused was informed within a reasonable period of the result of the Public Analysis so as to enable him to effectively exercise his right under Section 13(2). In the facts of the present case, the gross delay in filing the complaint is sufficient to cause prejudice to the accused. In such case, the benefit of this delay should not be given to the prosecution but it must go to the accused. If the provisions of the Act and the Rules are not complied with strictly and which provisions of the Act and Rules are held mandatory by the Court, the prosecution is not entitled to get a conviction of the accused. It is also to be borne in mind that today almost ten years have passed since the sample was taken. Nothing has been shown that the delay in the prosecution during this period of ten years, is attributable to any of the petitioners. In the present case, the conduct of the prosecution has

clearly resulted in the denial to the accused of any opportunity to exercise his right under Section 13(2). The right of the accused has got frustrated not on account of any reason for which the prosecution is not responsible but it has got frustrated only on account of the indifference and lax attitude on the part of the prosecution. On account of the conduct of the prosecution, the accused has been prejudiced in his defence as he has been denied a valuable right of defending himself solely due to the deliberate act of the prosecution. In the present case, the accused has been deprived of a valuable right conferred by Section 13(2), in such case, the prosecution of the accused cannot be sustained.

14. As a result, the proceedings relating to the Case No. 147 of 1998 pending before the learned Judicial Magistrate, F.C. Municipal Court, Thane, is quashed and set aside. Rule made absolute accordingly.

[V.K.TAHILRAMANI,J.]

CITATION

This will take me to the question as to whether delay in the institution of the prosecution per se cause prejudice to the accused and vitiates the trial. It was urged by M/s. P.D.Desai and H.K.Thakor that delay in instituting the complaint causes failure of justice in so far as a valuable right which is conferred upon the accused-vendor under Section 13(2) to have the sample sent to the Director of the Central Food Laboratory to be examined and certified is likely to be lost in the even the prosecution being launched after delay.